No. [redacted] 92

In the Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, APPELLANT

v.

WIESENFELD WAREHOUSE COMPANY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM

CLARENCE G. ASHBY
JAMES S. TAYLOR
850 Florida National Bank Building
Jacksonville, Florida

Attorneys for Appellee.

INDEX

CITATIONS

No. —

OCTOBER TERM, 1962

In the Supreme Court of the United States

UNITED STATES OF AMERICA, APPELLANT

v.

WIESENFELD WAREHOUSE COMPANY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

QUESTION ONE

WHERE FOOD HAS BEEN SHIPPED IN INTERSTATE COMMERCE, DOES SECTION 301(k) OF THE FEDERAL FOOD, DRUG AND COSMETIC ACT (21 U.S.C. 331(k)) PROHIBIT MERE POSSESSION OF SUCH FOOD BY A BAILEE IN A BUILDING WHICH IS ACCESSIBLE TO RODENTS, BIRDS AND INSECTS WHERE THE BAILEE DOES NOT HAVE KNOWL-

EDGE OF THE PRESENCE OF SUCH PESTS IN SUCH BUILDING?

QUESTION TWO

IF MERE POSSESSION OF SUCH FOOD IN A BUILDING WHICH IS ACCESSIBLE TO RODENTS, BIRDS AND INSECTS IS PROHIBITED WITHOUT REGARD TO THE FREEDOM FROM FAULT OR KNOWLEDGE OF THE POSSESSOR, DOES THE STATUTE DEFINE THE PROHIBITED ACTIVITY WITH SUFFICIENT CERTAINTY TO CONVEY A DEFINITE WARNING TO A PERSON OF ORDINARY INTELLIGENCE?

STATEMENT

This is a direct appeal from the final judgment and decree entered on October 22, 1962, by the United States District Court for the Southern District of Florida, dismissing an information filed against the Appellee for violation of Title 21, U.S. Code 331(k).

The Appellee is a public storage warehouse. It is charged with a violation of Title 21, U.S. Code 331(k), which prohibits:

> "The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

The information charges that the holding of food by the defendant in a building which is "accessible to rodents, birds

and insects" constitutes a violation of the above quoted statute. The District Court granted a motion to dismiss the information and from that order the United States of America appeals.

ARGUMENT

QUESTION ONE

WHERE FOOD HAS BEEN SHIPPED IN INTERSTATE COMMERCE, DOES SECTION 301(k) OF THE FEDERAL FOOD, DRUG AND COSMETIC ACT (21 U.S.C. 331(k)) PROHIBIT MERE POSSESSION OF SUCH FOOD BY A BAILEE IN A BUILDING WHICH IS ACCESSIBLE TO RODENTS, BIRDS AND INSECTS WHERE THE BAILEE DOES NOT HAVE KNOWLEDGE OF THE PRESENCE OF SUCH PESTS IN SUCH BUILDING?

The information here alleges only that food was held by a public storage warehouse which was accessible to rodents, birds and insects, and was thereby exposed to contamination. This, the Government argues, is an insanitary condition and the holding of food under such conditions constituted a crime.

It is submitted that every building, save only one without doors, windows or other openings, is "accessible to rodents, birds and insects." A warehouse, of course, must have means of access, and ordinarily it is impossible to keep the access openings closed or protected during the hours when goods are being received or discharged from the warehouse. Thus, by the very nature of the warehouse industry, and regardless of the extent of precautionary measures taken to assure sanitary conditions within the warehouse, every warehouse in the land is, and must be accessible to rodents, birds and insects, and as

a result thereof, any time food is stored in such a place, it is, and must be exposed to contamination by such pests. This is so regardless of the extent of measures taken by the warehouseman to protect the premises from invasion by such pests.

The Government's contention here appears to be that a warehouseman must bear criminal responsibility for circumstances completely and totally beyond his control if food may become contaminated while in his possession. The natural consequence of such a position is that if food at any time in fact becomes contaminated, the possessor of that food is guilty of a crime. If Congress, intended such a far-reaching result, its intent has not been communicated by the words of the statute.

Congress has forbidden "the adulteration, mutilation, destruction, obliteration, or removal" of labels on foods in interstate commerce, or "the doing of any other act with respect to a food" while it is held for sale, if the doing of that act results in the article becoming adulterated.

In the opinion of the District Court, the phrase "the doing of any other act" must be qualified and restricted to the same general type of activity which is specifically prohibited. Contrary to the argument of the Government in the Jurisdictional Statement, the Court below did not hold, and it is not now and never has been the contention of this defendant that "the doing of any other act" is restricted to acts related to labeling. It is contended only that each of the named classes of acts prohibited by the statute imply a specific activity, or some affirmative action, on the part of the person the statute was intended to prohibit from the doing of such act. The clear meaning of the statute is that no one shall affirmatively do anything to a food which would result in its becoming adulterated. Mere possession of that

food under the circumstances alleged in the information does not constitute a crime.

The basic principles of statutory construction require that where a general term follows an enumeration of specific classes of activity, the general term will be limited to the same general classes of activity as those enumerated. 82 Corpus Juris Secundum, *Statutes*, Section 332(b). Since the specific acts prohibited by the statute each imply some positive activity, the general term "doing of any other act" must be limited in its meaning to some positive type of activity. Here the Government charges only that the food was held in a building which was "accessible to rodents, birds and insects." There is no charge that the defendant did anything with respect to the food other than to possess it.

Furthermore, the statute requires that for criminal responsibility to attach, the food must be "held for sale." It is conceded by the Government here that this defendant did not hold the food for sale, for the defendant was a mere bailee having only naked possession of the food. The Government contends that the term "held for sale" really means "in the hands of any one other than the ultimate consumer." If Congress had intended such a meaning, it would have been an easy matter to say so. Such a construction is not indicated either by the act or by its legislative history.

The term "held" in ordinary usage implies a degree of ownership — something more than mere possession of someone else's goods as a bailee. *Howell v. Commissioner of Internal Revenue*, 140 F.2d 765. See also 40 *Corpus Juris Secundum* 406. Here the defendant claims no ownership in the food. It was not holding the food for sale. For all that appears in the information, it did not even know whether or not its customer held the food for sale.

It is submitted that the statute, when properly construed,

so obviously does not encompass the acts alleged in the information to have been committed by the defendant as to require no further argument before this Court.

QUESTION TWO

IF MERE POSSESSION OF SUCH FOOD IN A BUILDING WHICH IS ACCESSIBLE TO RODENTS, BIRDS AND INSECTS IS PROHIBITED WITHOUT REGARD TO THE FREEDOM FROM FAULT OR KNOWLEDGE OF THE POSSESSOR, DOES THE STATUTE DEFINE THE PROHIBITED ACTIVITY WITH SUFFICIENT CERTAINTY TO CONVEY A DEFINITE WARNING TO A PERSON OF ORDINARY INTELLIGENCE?

The question of vagueness or uncertainty in criminal statutes has been considered by this Court in a multitude of cases from which has been derived a series of tests or standards of construction which should be applied in determining whether or not a criminal statute is so vague as to offend the provisions of the Fifth and Sixth Amendments to the Constitution of the United States. In *Connally v. General Construction Co.*, 269 U.S. 385, 70 L.Ed. 322, this Court said that in order for a penal statute to be valid,

> "The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, *in advance*, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another." (Emphasis supplied)

In *Lanzetta v. New Jersey*, 306 U.S. 451, 83 L.Ed. 888, this Court said:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. . . And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The Government in its Jurisdictional Statement, has placed some reliance on the decision of this Court, in *United States v. National Dairy Products Corp.*, No. 18, this Term, decided February 18, 1963. In that case, the Supreme Court upheld the validity of Section 3 of the Robinson-Patman Act, which prohibits the sale of goods at "unreasonably low prices for the purpose of destroying competition." The Court pointed out, however:

> "We think the additional element of predatory intent alleged in the indictment and required by the Act provides further definition of the prohibited conduct. We believe the notice here is more specific than that which was held adequate in *Screws v. United States*, 325 U.S. 91, 89 L.Ed. 1495, 65 S.Ct. 1031, 162 ALR 1330 (1945) in which a requirement of intent served to 'relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

In both the Screws' case, referred to in the citation above, and the *National Dairy Products Corp.* case, the element of intent required by the statute and alleged in the informations, supplied the necessary specificity of warning. In the instant case, the element of intent is lacking, and therefore to be sustained the statute must be so clear on its face that one acting without intent will be apprised of its prohibitions.

It is submitted that in reading Section 301(k) which by its terms requires the doing of an act with respect to a food while

it is held for sale, a person of normal intelligence would assume that he must *do* something to a food that *he* is holding for sale before criminal responsibility would fall upon him.

The Government relies also upon *United States v. Sullivan*, 332 U.S. 689, where this Court in a divided opinion, held that Section 301(k) was sufficiently definite to withstand a constitutional objection when applied to a druggist who held drugs for sale when it appeared that the druggist had removed pills from a labeled bottle and put them into an unlabeled box. That case involved an affirmative act done to a drug by a person who held it for sale. It is interesting to note Mr. Justice Frankfurter's comments in his dissenting opinion that:

> "If it takes nine pages (of the majority opinion) to determine the scope of a statute, its meaning can hardly be so clear that he who runs may read, or that even he who reads may read. Generalities regarding the effect to be given to the 'clear meaning' of a statute do not make the meaning of a particular statute clear."

We do not contend here that the statute is unconstitutional in its abstract sense. It is the application of the statute to this defendant under the circumstances alleged in the information here involved which is objected to. It is submitted that one of ordinary intelligence would not and could not read into the words of the statute the imposition of absolute criminal liability on a bailee when he holds food in a warehouse which is "accessible" to rodents.

CONCLUSION

In conclusion, it should be noted that the United States has ample power and authority to protect the stream of interstate commerce from pollution by adulterated foods by vigorous use of the seizure provisions of Section 304(a) of the Food,

Drug and Cosmetic Act (21 U.S.C. 334(a)). That section clearly and unequivocally grants to the Government the power to seize adulterated foods in the stream of commerce. But the Government here seeks to impose severe criminal sanctions against bailee of food whose only fault is that his building is "accessible to" pests and who is, by the very nature of his business, powerless to avoid that condition regardless of the care and precautionary measures he may take to protect his building against invasion by such pests.

It appears that the United States, in this case, is attempting to extend the power of the Food and Drug Administration to dangerous limits not stated in or contemplated by the Act. If every person who has possession of food which at any time has been in interstate commerce, becomes guilty of a crime when that food accidentally becomes contaminated without any affirmative act on the part of the possessor, then Congress should so state in language sufficiently definite to apprise us all of our potential criminal responsibility. It is submitted that the contentions of the the Government here are so baseless and unsubstantial as to require no further argument before this Court, and the Judgment appealed from should be affirmed.

Respectfully submitted,

CLARENCE G. ASHBY
JAMES S. TAYLOR
850 Florida National Bank Building
Jacksonville, Florida

Attorneys for Appellee.

PROOF OF SERVICE

I, Clarence G. Ashby, attorney for Wiesenfeld Warehouse Company, Appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of April, 1963 I served copies of the foregoing Motion to Affirm on the Appellant, the United States of America, by mailing copies thereof in a duly addressed envelope with airmail postage prepaid to Archibald Cox, Solicitor General, United States of America, Department of Justice, Washington 25, D.C., attorney of record for Appellant.

Attorney for Appellee